STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN TOOLING ASSOCIATION WORKERS' COMPENSATION FUND, in its own right and as Subrogee of DISTEL TOOL & MACHINE CO.,

Plaintiff-Appellee,

vs.

FARMINGTON INSURANCE AGENCY, L.L.C., a Michigan limited liability corporation,

Defendant-Appellant,

and

MACHINERY MAINTENANCE SPECIALISTS, INC., a Michigan corporation,

Defendant,

and

FARMINGTON INSURANCE AGENCY, L.L.C.,

Third-Party Plaintiff-Appellant,

vs.

EMPLOYERS INSURANCE OF WAUSAU and WAUSAU INSURANCE COMPANIES,

Third-Party Defendants-Appellees.

Supreme Court No. 127834

Court of Appeals No. 249013

Oakland Circuit No. 01-030684-CK
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127834

PLAINTIFF-APPELLEE'S RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF ORDER BEING APPEALED & RELIEF SOUGHT

Plaintiff-appellee objects that appellant's statement of the order being appealed and the relief sought is a continuation of argument rather than a straight-forward statement that defendant seeks to appeal the Court of Appeals opinion decided December 7, 2004, and that defendant seeks to have leave granted and that decision reversed.

Because defendant has exceeded the scope of MCR 7.302(A)(1)(a) by including argument, defendant has side-stepped the requirements of MCR 7.302(A)(1)(d), MCR 7.302(A)(1)(e), MCR 7.212(C)(6), and MCR 7.212(C)(7), which require appropriate citations to the record on appeal.

In particular, defendant asserts that certain "facts" were "undisputed," without citing to the record. In fact, the matters defendant asserts were "undisputed" were contested, tried in a four-day bench trial, and decided (generally against defendant's position) in a well-considered written thirteen-page opinion of the trial judge. Defendant wants to retry the case at the Supreme Court, and asks the Court to make factual determinations and enter a judgment (including allocating so-called comparative negligence).

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. DOES THIS CASE MEET THE CRITERIA FOR GRANTING LEAVE TO APPEAL?

Plaintiff answers No.

Defendant answers Yes.

II. DEFENDANT ARGUES THAT THE LAW SHOULD NOT RECOGNIZE A DUTY TO UNKNOWN AND UNFORESEEABLE USERS OF INFORMATION; DID THE COURT OF APPEALS RULE THAT THE LAW SHOULD RECOGNIZE SUCH A DUTY?

Plaintiff answers No.

Defendant answers Yes.

III. DID THE CIRCUIT COURT AND COURT OF APPEALS CORRECTLY REJECT DEFENDANT'S "COMPARATIVE FAULT" ASSERTIONS?

Plaintiff answers Yes.

Defendant answers No.

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COUNTER-STATEMENT OF FACTS

A. INTRODUCTION

Caution must be exercised with regard to facts that defendant alleges are "undisputed" (an adjective defendant uses 20 times in its application). The statement of facts in the application reflects what defendant *wishes* had been shown at trial, rather than what was *actually* shown at trial.

The exhibits attached to defendant's brief are not accurate depictions of the evidence in the trial court record. Defendant's exhibit A, produced in black-and-white, does not accurately depict the actual exhibit which was in color. Ordinarily, this might not be a major point, but the color exhibit showed in bright red cursive that defendant had successfully faxed the identical document appearing in plaintiff's records. Not only does defendant wish to shy away from that fact, but defendant has the gall to say that it is "undisputed" that the document was *never* faxed. The color exhibit was admitted into evidence at trial and was presented to the Court of Appeals to *show* that plaintiff received it, and both courts *agreed* that plaintiff received it.

Exhibit B was not used at trial. It contains revisions from 2003 (see pages vii, ix, and I-3 of defendant's exhibit B), adopted long after the case was tried.

The essence of this case is simple: Farmington Insurance Agency issued a false certificate of insurance expressing that Machinery Maintenance Specialists (MMS) was insured for workers compensation. Farmington Insurance Agency had no authority to issue that false certificate, under the rules of the Placement Facility or Michigan's Insurance Code. Personnel at MMS believed that the issuance of the certificate of insurance was an indication that its payment of premium issues had been resolved, so they relied on the certificate and distributed it to its construction industry customers, including Distel Tool. In addition, there is evidence (best shown by the color copy of the exhibit that defendant has chosen to attach only in black-and-

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white) that Farmington Insurance Agency also sent the certificate to plaintiff. In reliance upon that certificate (showing valid workers' compensation insurance to be in effect), plaintiff let MSS's employee work on its premises. That worker was injured; under workers' compensation law, plaintiff was determined to be the "statutory employer" of the injured worker because MSS did not actually have insurance. Thus, plaintiff was statutorily obligated to pay workers' compensation benefits because it relied on the false certificate of insurance issued by defendant.

B. DETAILED FACTS

Plaintiff, Michigan Tooling Association Workers' Compensation Fund, brought this case in its own right and as subrogee of Distel Tool & Machine Company (Complaint filed: 3/29/01). Plaintiff is a group of self-insured employers under the Workers' Disability Compensation Act under MCLA 418.611, et. seq. (Complaint, p. 1, ¶ 1). One of Plaintiff's members, Distel Tool, asked Machinery Maintenance Specialists (MMS; a named Defendant herein) to provide a certificate of insurance before one of MMS's employees, Tives Staten, would be allowed on Distel's premises to fix one of Distel's industrial machines. Id., p. 2, ¶ 6. MMS provided a certificate which had been provided, in turn, by the Defendant insurance agency, Farmington Insurance Agency, LLC (hereinafter: "Defendant"). Defendant provided this certificate to MMS, even though MMS, which had insurance coverage only through the workers' compensation placement facility, had no insurance at the time, its workers' compensation coverage having been canceled for non-payment of premium. Id., p. 2, ¶¶ 6-8. As a result of Defendant's issuance of the certificate of insurance, Distel allowed Mr. Staten, MMS's employee, onto Distel's premises, where he suffered a work-related injury when a hi-lo fork fell and crushed his left foot. Id., p. 2, ¶ 7. Pursuant to the Workers' Disability Compensation Act, more particularly, MCLA 418.171(1), Staten became Distel Tool's statutory employee. Plaintiff had to pay Mr. Staten's compensation claim. Id., p. 3.

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Plaintiff brought claims for breach of contract and negligence against Defendant, the insurance agent issuing the certificate Distel Tool relied upon (Complaint, Counts II-III, pp. 4-6).

Defendant appeals of right from the Circuit Court's judgment in Plaintiff's favor on the negligence count (Claim of Appeal filed: 6/2/03; corrected Final Judgment entered: 5/28/03). Plaintiff cross-appeals from the Circuit Court's rejection of the third-party beneficiary contract claim (Complaint, Count II; 5/28/03 Judgment, p. 3, ¶ 3).

Arnold Primak, sole owner and president of Michigan Machinery Specialists (MMS) had provided machinery maintenance services to Distel Tool for several years prior to Mr. Staten's injury (TR., 2/22/02, pp. 47-48). Mr. Primak stated that he and his company rely on Farmington Insurance Agency (Defendant) for their insurance needs. Id., 49-50. He relied upon Defendant to procure coverage for MMS. Id., 51. Defendant would provide certificates of insurance to Mr. Primak/MMS, which he would show to his customers, including Distel Tool, prior to MMS's personnel's entry onto the customer's premises. Id., 53-54.

In January 1998, Mr. Primak received a Notice of Cancellation from his compensation carrier, Wausau Insurance (Exh. A; Notice dated: 1/26/98; TR., 2/22/02, pp. 61-63).[1] He then contacted Defendant about the cancellation, prior to Mr. Staten's accident. Id., 63-64. The effective date of the cancellation was February 20, 1998. Id., 62-63.

Mr. Staten was injured later, on April 1, 1998, on Distel Tool's premises. In March, 1998, Primak had provided a certificate of insurance to Richard Distel, of Distel Tool, in response to Mr. Distel's demand for same. Id., 55-57. Indeed, Mr. Primak testified that

[1] The exhibits were admitted into evidence in the lower court and are identical to those appended to plaintiff's brief at the Court of Appeals.

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Defendant provided the certificate directly to Distel Tool. Id., 56-57. Primak told Defendant to send Distel Tool a certificate for MMS. Id., 59.

Mr. Primak's requests to Defendant for certificates of insurance, including worker's compensation insurance, were an ongoing aspect of his dealings with Defendant over a decade, a routine part of his business. Id., 66. He asked for such certificates between one and three times per month. Id., 67. He knew that his customers, which would include Distel Tool, relied on certificates. Id., 69. Mr. Primak testified that Defendant was aware of Wausau's cancellation notice. Id., 111-112. At deposition, he testified that he actually told Defendant that he had received the certified letter/cancellation notice. Id., 112.

The record shows that Plaintiff was rendered liable to Mr. Staten by MMS's uninsured status (Exh. C; Opinions/Orders in Worker's Compensation Bureau; admitted: TR., 2/22/02, 114-115).

David Clappison is a licensed insurance agent, employed by Defendant. Id., 120-121. He admitted that he and Defendant were aware of the nature of Mr. Primak's business (MMS), that he was a machine millwright, and that MMS provided repair workers to visit other companies' premises to repair industrial machinery. Id., 123-124. He admitted that on March 6, 1998, one of Defendant's employees, Becky Steingold, issued the false certificate of insurance, indicating that MMS had worker's compensation coverage extending from September 30, 1997 to September 30, 1998. Defendant thus issued the certificate after the cancellation by Wausau of MMS's worker's compensation coverage. Id., 125-126 (Exh. D). Steingold is a customer service representative and a long-time employee of Defendant (TR., 2/22/02, 126). Clappison asserted that it was part of Steingold's job responsibility to issue certificates of insurance, making no differentiation with regard to insureds who had insurance through the Worker's

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Compensation Placement Facility. Id., 127-128. Defendant had no training manual for the tenure of Steingold's employment. Id., 130-131.

Defendant knew that MMS (Primak's company) was a high-risk insured. MMS had received a previous notice of cancellation, and had trouble obtaining coverage even through the Placement Facility "due to non-payment of a prior audit" just the previous summer (Plaintiff's Exh. E). Clappison admitted that anyone reading his company's file would be aware that as between the carrier Wausau and MMS there were questions not only with regard to premium payments, but also compliance with audit requests (TR., 2/22/02, 140). The previous cancellation notice is attached hereto as Exh. A.

Also, Defendant's file showed that MMS had gone without worker's compensation insurance entirely for five months from April through September, 1997 (TR., 2/22/02, pp. 172-173). There were three letters in Defendant's own file showing continual reminders to Mr. Primak of his worker's compensation insurance obligations. Id., 173.

Nevertheless, on March 6, 1998, Defendant had issued a "certificate" indicating that MMS had compensation coverage through September 30, 1998. The certificate provides:

> "THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN AS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS." [Exh. D].

The "Certificate Holder" listed on this insurance certificate is David Freedman, Inc., not Distel Tool. Note further, however, that the certificate contains the following language:

> "THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS

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CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW." [Exh. D].

Apparently, Primak had sent one of his workers to the premises of David Freedman, Inc., around the same time, at which point Defendant had issued a certificate of insurance. It was that certificate which Primak showed Mr. Distel prior to Staten's visit to the Distel premises. Id. It was that same certificate that found its way into Mr. Distel's insurance file with Becky Steingold's hand-written "success" notation endorsed thereon, indicating that her fax to MMS/Primak was successfully sent.

It is very important to note that Wausau issued the policy to MMS only in its capacity as a servicing carrier through the Michigan Workers' Compensation Placement Facility. The Facility's "Information & Procedures Handbook" (Exh. H) specifically provides that the agent (in this case, Defendant) lacks authority to issue certificates to such insureds. Instead, "Certificates of Insurance are to be issued by the Servicing Carrier [here: Wausau] within 5 working days of receipt of the request." If "more immediate issuance is required ... the Servicing Carrier should be contacted to see what arrangements can be agreed upon" (Exh. H, p. P-12). The agent is not to issue such certificates on its own:

> "**Important note to the agent**: Remember, although you have a very important role in procuring coverage through the Facility you are not a contract agent or agency of the Servicing Carrier. You have no authority from the Servicing Carrier to bind or cancel coverage or to otherwise act within such an agency relationship. **Unless a legal finance agreement exists which assigns cancellation or premium refund collection rights to a third party, all premium transactions are strictly between the Servicing Carrier and the employer as a policyholder and you are not a party to that contract.** A Servicing Carrier may give you certain authority, such as permission to issue certificates of insurance, but such rights are not to be routinely assumed by an agent. Read this handbook carefully and if you still have a question about your authority, contact the Facility or the Servicing Carrier." [Id., p. I-2].

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Mr. Clappison admitted that the certificate was false (TR., 2/22/02, 151). He further conceded that MMS's customers who receive a certificate of insurance and who read it would have a right to rely on the information which Defendant put on the form, including the nature and dates of the insurance coverage noted thereon. Id., 152.

Clappison further conceded that it would the most egregious breach of any modicum of insurance responsibility on his company's part to issue a certificate of insurance on a canceled policy ("It would be a breach of duty"). Id., 178. Defendant could have called the carrier, Wausau, to confirm coverage, but did not. Id., 178. Although Clappison claimed his company did not send the certificate to Distel Tool itself, he had no explanation for its presence in Distel Tool's file, and conceded that Defendant had sent it to David Freedman, Inc., as well as Mr. Primak (MMS). Id., 179. The same certificate appears in Distel's file, with the red "success" endorsement, that could have come from one source only -- the defendant.

Defendant's employee, Ms. Steingold, admitted issuing the certificate in question (TR., 4/8/02, pp. 5, 8, 10). She faxed it to David Freedman, Inc., and mailed a copy to Mr. Primak. Id., 15. She knew that entities looking at the certificate would rely on the accuracy of the information. Id., 19. It is obvious from Steingold's testimony that she did not even check Defendant's own file for information concerning MMS, but only glanced at the "top" of the file for "the most current information," and thus missed the previous indicators of MMS's sloppy worker's compensation insurance practices. Id., 20-21. She admitted, however, that she had been aware that MMS was uninsured for several months in 1997. Id., 22. She was aware that Wausau had previously canceled MMS, in December of 1997, for failure to pay premium. Id., 22-23 (Exh. F). None of these previous events caused her any concern or to question anything before issuing the certificate (TR., 4/8/02, 23-24).

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It is further obvious from Steingold's testimony that she had no knowledge whatsoever of the appropriate method of issuance of certificates concerning insureds who obtain coverage only through the Placement Facility. Id., pp. 25, et. seq. She admitted that she was familiar with the Facility, however, and that it was created for employers who cannot obtain insurance through the private market, and who present substandard risks. Id., 25. This is exactly why Clappison had placed coverage through the Placement Facility -- it is an assigned risk facility. Id., 25-26. Steingold nevertheless believed that agents, such as Defendant, have "permission by the Servicing Carrier to issue certificates of insurance as part of the Placement Facility business." Id., 27. Steingold had never seen the Placement Facility Information & Procedures Handbook. Id., 27 (Exh. H). She had only been taught how to issue certificates, as a matter of general practice, without regard to the Placement Facility rules (TR., 4/8/02, 28). She had never reviewed any written procedures of any kind relating to Placement Facility insureds, in particular. Id., 28.

Thus it came to pass that, in violation of the limits of Defendant's authority upon issuance of certificates relating to such insureds, Defendant, through Steingold, simply issued the certificate for an insured who had, in fact, seen its compensation coverage canceled a fortnight earlier. Id., 32. Moreover, Defendant did so without authority from Wausau, the Servicing Carrier. Id. Steingold, ill-trained as she was, simply assumed that Wausau had given Defendant authority to issue the certificate. Id., 66-67. That assumption was statutorily invalid. MCL 500.1201.

Wausau had given Defendant no such authority, as shown by the testimony of Wausau employee, Jodie Skrzypchak. Id., 74, 83. Skrzypchak further testified that Wausau had mailed a

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copy of the notice of cancellation of MMS's coverage to Defendant, and that it was not returned undeliverable. Id., 85-87.

Plaintiff's expert on insurance agency practices, Lawrence Polec, is a career insurance agent employed in Chicago, Illinois (and previously in Michigan); and holds licenses from both states. Id., 142-145, 149. His opinion "is that the certificate of insurance should not have been issued by [Defendant] because coverage, there's no evidence that suggests that coverage was confirmed as in effect. And industry best practices are such that that is the standard." Id., 155-156. Polec cited two grounds for this opinion: (1) only the carrier is supposed to issue the certificate, where "Placement Facility insureds" are concerned; and (2) it was obvious from Defendant's own file that MMS "had conducted its insurance business in a questionable fashion which in turn kind of throws up red flags for us agents as to how you conduct business with a particular client." Id., 157-158. There was a history of lack of audit cooperation, nonpayment of premium, and a worker's compensation coverage gap "for a period between May and September of 1997." Id., 158.

Richard Distel, of Distel Tool, relied on the certificate in allowing Mr. Staten, MMS's employee, on his premises (TR., 6/19/02, pp. 9-13). The certificate, in Mr. Distel's mind, "indicated MMS was covered and to [his] satisfaction and [he] allowed them to proceed with the work" on that basis. Id., 11. Mr. Distel looked specifically at the expiration date of the compensation coverage certified by Defendant (through September, 1998). Id., 11-12. That David Freedman, Inc. was the certificate holder was of no concern to Mr. Distel, because, as Mr. Distel accurately testified:

> "I imagine these things get, I'm not an insurance expert, but I assumed that these things get scattered around and that was like a mailing address to which this previously had been sent by Mr. Primak's insurance company." Id., 13.

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Plaintiff's attorney was in the midst of his cross-examination of Defendant's "expert", Mr. William Brunett, when he asked Mr. Brunett whether he was aware that Defendant had affirmatively admitted that it had issued the certificate for the benefit of Distel Tool (TR., 8/28/02, 38). Not only had Defendant alleged, in the Third-Party Complaint against Wausau (filed: 5/22/01, p. 4, ¶ 11), that "a Certificate of Insurance was issued by [Defendant] for the benefit of MMS and for the benefit of Distel on or about March 6, 1998," but further, Defendant had admitted the truth of ¶ 10 of Plaintiff's Complaint, which reads as follows (Complaint, p. 3):

> "During that period from January 29, 1998 to April 1, 1998, MMS asked FIA to issue certain Certificates of Insurance to MMS customers, including Distel, in order to confirm to those customers that MMS carried required worker's compensation insurance."

(See: Defendant's Answer; 5/4/01, p. 2, ¶ 10 ["admits same."]). Only on the last day of trial proofs did Defendant move to amend to delete these damaging admissions (TR., 8/28/02, 81-85). Plaintiff's attorney opposed the motion, noting that it was "not timely." Id., 85. The Circuit Judge allowed the amendment, stating, "I don't think it makes any difference or prejudices anyone." Id., 88.

The Circuit Court expressed its findings and conclusions in the "Opinion & Order" of December 13, 2002 (Defendant-Appellant's Exh. A). Those findings and conclusions are incorporated herein by reference.

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ARGUMENT

I. THIS CASE DOES NOT MEET THE CRITERIA FOR ACCEPTANCE OF LEAVE TO APPEAL

MCR 7.302(B) establishes requirements for leave applications. It specifically provides:

> The application must show that
>
> (1) the issue involves a substantial question as to the validity of a legislative act;
>
> (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
>
> (3) the issue involves legal principles of major significance to the state's jurisprudence;
>
> (4) in an appeal before decision by the Court of Appeals,
>
> (a) delay in final adjudication is likely to cause substantial harm, or
>
> (b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan Statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid;
>
> (5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or
>
> (6) in an appeal from the Attorney Discipline Board, the decision is erroneous and will cause material injustice.

None apply here. The two most relevant provisions are subsections 3 and 5. As a result, they will be addressed here.

Defendant has failed to demonstrate how this issue involves legal principles of major significance to the state's jurisprudence. MCR 7.302(B)(3). This was a fact-intensive matter

based on the commercial practices of a narrow field of industry. The Court of Appeals' decision was unpublished, and therefore does not have statewide binding effect. See MCR 7.215(C)(1).[2]

For reasons more fully explained in the next two sections of this brief, the decision is not "clearly erroneous" and does not cause material injustice. MCR 7.302(B)(5). Clear error has not been shown because the decision appears to be a correct interpretation of longstanding legal principles and is consistent with the framework of the Workers Compensation statutes.[3] Material injustice has not been shown because defendant concedes (Application, p 29) that it could also be liable under an innocent misrepresentation theory if the negligence theory were to be struck down.

Moreover, the decision does not conflict with a Supreme Court decision or another decision of the Court of Appeals. In fact, despite defendant's assertions that this is a matter of first impression (which, of course, defeats any claim of "conflict"), this is actually an issue that has arisen before. In the prior case, *Kaminskas v Litnianski*, 51 Mich App 40 (1973), the Michigan Court of Appeals reached a consistent – not conflicting – decision. In turn, that decision was based on principles enshrined in the Restatement of Agency, the product of generations of legal thought and research. Plaintiff suggests that there is a good reason why the jurisprudence of this state has gone 32 years without conflicting authority over this point: the statement of law was accurate in 1973, and remains accurate today. This Court need not rely on

[2] "An unpublished opinion is not precedentially binding under the rule of stare decisis."
[3] Defendant's application for leave merely repeats the arguments the Court of Appeals rejected. As a result, plaintiff's response in sections II and III of this brief also essentially repeats the arguments raised in its brief at the Court of Appeals.

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defendant's foreign authority where Michigan authority is well established. In addition, even a cursory review of defendant's foreign cases shows that they do not support defendant's position.[4]

II. THE COURT OF APPEALS DID NOT RULE – AS DEFENDANT MAINTAINS – THAT THE LAW RECOGNIZES A DUTY TO UNKNOWN AND UNFORESEEABLE USERS OF INFORMATION.

A. Standard of Review

The existence of a duty requisite to imposition of negligence liability poses a question of law. *Beaty v Hertzberg & Golden, P.C.*, 456 Mich 247, 262 (1997). This Court reviews questions of law de novo. *Zander v Ogihara Corp.*, 213 Mich App 438, 441 (1995). It is for the trier of fact, however, to determine "whether the facts in evidence establish the elements of [a] relationship" sufficient to sustain the existence of a duty. *Smith v Allendale Mutual Insurance*, 410 Mich 685, 714 (1981). Since this was a bench trial, the appellate courts will review such factual findings for clear error, and will reverse only upon reaching a definite and firm conviction that the Circuit Court made a mistake in finding the factual requisites to imposition of

[4] For example, in *Lu-An-Do, Inc v Kloots*, 131 Ohio App 3d 71; 721 NE2d 507 (1999), the Ohio Court of Appeals distinguished its case from a situation where a duty can be extended under the Restatement of Torts to "a member of a limited class whose reliance on the professional's representation is specifically foreseen" (such as those who might rely on accountants' reports). Our case directly addressed that question, and it was determined that plaintiff was within that type of limited class. The Maryland Court of Special Appeals in *Prudential Securities, Inc v E-Net, Inc*, 140 MD App 194; 780 A2d 359 (2001), addressed duties under the UCC, an issue not involved here. In *Quigley v Bay State Graphics, Inc*, 427 Mass 455; 693 NE2d 1368 (1998), the Massachusetts Supreme Court examined whether a third party had a right to "rightfully and foreseeably" expect insurance beyond that which was required by the state's automobile insurance statutes. In our case, plaintiff had a right to rely on the expectation that the statutorily mandated workers compensation insurance had been issued when defendant said it was. In *Seal v Hart*, 310 Mont 307; 50 P3d 522 (2002), the Montana Supreme Court recognized its limited role in reviewing factual findings, and determined that the trial court did not err when it concluded after hearing all the evidence that there was not a special relationship between the parties giving rise to a duty. Here, the proofs showed otherwise, and the trial court's factual finding is entitled to the same level of deference.

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a legal duty. *Zine v Chrysler Corp.*, 236 Mich App 261, 270 (1999); see also, *Walters v Snyder*, 239 Mich App 453, 456 (2000).

B. Discussion

Defendant insists that the Court of Appeals has imposed a duty when other parties are unforeseen and unknown. The Court of Appeals made no such ruling. Instead, the Court recognized –as did the circuit court – that plaintiff was in a class of foreseeable parties under the Workers' Compensation laws and could be expected to rely on the false certificate of insurance issued and circulated by defendant.

"In determining whether to impose a duty, [the] Court evaluates factors such as: the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *Foster v Cone-Blanchard Machine Co.*, 460 Mich 696, 707 (1999); quoting, *Murdock v Higgins*, 454 Mich 46, 53 (1997).

In this case, as the Circuit Judge correctly discerned, Plaintiff fell among the class of foreseeable, statutory employers, who would be responsible for payment of compensation benefits to persons such as Mr. Staten, injured on its premises, in the event that Staten's employer, MMS, proved to be uninsured. Under the workers' compensation law, an employer (referred to as a "principal") contracting with another entity for services is liable to the employees of that entity should the contractee not have compensation coverage for such workers. MCLA 418.171(1). That is exactly what happened here. MMS lacked worker's compensation coverage. Defendant affirmatively certified that MMS had compensation coverage through September of 1998. Mr. Staten was injured in April, that same year. The relationships, and the entire purpose of such certificates' issuance, are clearly such that the harm is foreseeable.

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The burden on Defendant, making a simple telephone call to Wausau, is certainly not an onerous one. The risk is huge -- here: that entities such as Distel Tool, and its subrogee (Plaintiff) would have to pay substantial worker's compensation claims, such as Mr. Staten's.

A key fact in determining the magnitude of the risk, as well as the foreseeability of the harm, peculiar to the instant case, is MMS's status as an insured only through the Michigan Worker's Compensation Placement Facility. By definition, MMS was a high risk; otherwise, Defendant would not have obtained coverage for MMS through the Facility. It is the expressed, legislative purpose of the establishment of that Facility to provide worker's compensation insurance to employers who are "unable to procure the insurance through ordinary methods." MCLA 500.2301(a); see also, *Michigan Association of Insurance Agents v Michigan Worker's Compensation Placement Facility*, 220 Mich App 128, 130-132 (1996). The Legislature has carefully ordained the creation of servicing carrier "performance standards" so as to ensure the availability of compensation coverage and benefit payments to employees of the high risk employers insured through the Facility. MCLA 500.2312(1)(b).

For its part, the Defendant insurance agency was "entitled to receive ... a commission for placing insurance through the facility at the uniform rates of commission as provided in the plan of operation" of the Facility. MCLA 500.2322(b). Defendant received payment for its trouble. Defendant is permissibly held liable for negligent performance of its contractual undertaking. *Schanz v New Hampshire Insurance*, 165 Mich App 395, 403, incl. fn. 3 (1988); Restatement of Torts (2d), § 324A. Accompanying every such contractual undertaking "is a common-law duty to perform with ordinary care the thing agreed to be done," so "that a negligent performance constitutes a tort as well as a breach of contract." *Clark v Dalman*, 379 Mich 251, 261 (1967).

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In issuing the certificate, furthermore, Defendant violated the rules of the very same Facility through which the insurance was procured in the first place. Such violations show Defendant's negligence. *Beals v Walker*, 416 Mich 469, 481 (1982); *Hardaway v Consolidated Paper Co.*, 366 Mich 190, 197 (1962). Defendant knew, or should have known, that only the Servicing Carrier (Wausau) could issue the certificate, and that Defendant and its personnel could not blithely assume authority to issue such certificates. They did so here. Defendant was plainly negligent, in this case, for not even bothering to train its long-time personnel, specifically, Steingold, in the proper handling of the issuance of certificates to "Facility" insureds. Defendant was shockingly ignorant of the rules governing the issuance of certificates relating to employers insured through the Facility (see: Exh. H, pp. I-2, P-12). In fact, Mr. Clappison admitted that it would be negligent agency work to issue a certificate for an insured whose coverage had been canceled (TR., 2/22/02, 178).

This is not a case involving an insured's claim against the carrier's agent. Compare, *Harts v Farmers Insurance Exchange*, 461 Mich 1, 7 (1999). In this case, Defendant was MMS's agent. Defendant assumed an unlawful measure of authority -- the issuance of certificates -- and is properly held liable for the injurious results of that invalid assumption. *Kaminskas v Litnianski*, 51 Mich App 40, 46-47 (1973) (copy attached as Exh. M). Even under Harts, involving the carrier's agent, the general "no duty" rule changes when "the agent misrepresents the nature or extent of the coverage afforded or provided." *Harts*, 461 Mich 1, 10-11.

The identity of the "certificate holder" on this particular certificate is of no moment. The certificate, no matter who the "certificate holder" was, contained an affirmative misrepresentation that MMS had worker's compensation coverage extending through September,

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1998 -- well beyond the date of Mr. Staten's accident. It was reasonably relied upon by Mr. Distel, to his detriment and that of his company, and Plaintiff's. Defendant knew the nature of MMS's business, that it was in the business of servicing various companies' heavy industrial machinery. It was hardly beyond the realm of predictability or foreseeability that Mr. Primak would show the same certificate to others. The certificate was a hand grenade with the pin pulled, and would prove injurious to anyone near whom it landed; Distel Tool just happened to be in that unfortunate location, as a result of Defendant's negligence. If Defendant had not issued the false certificate of insurance, none of this would have ever happened, and Plaintiff would not have sustained its economic harm.

Furthermore, the issuance of the certificate violated MCLA 500.1201, providing that Defendant could not "act as an insurance agent unless ... authorized in writing by an insurer ... which authorization specifie[d] the extent of the person's authority to act for the insurer". MCLA 500.1201 (copy attached hereto as Exh. L). This statutory violation, not excused, requires entry of judgment in Plaintiff's favor. *Widmayer v Leonard*, 422 Mich 280, 286 (1985); *Zeni v Anderson*, 397 Mich 117, 129, incl. fns. 7-8 (1976).

Given that the existence of a duty sufficient to support a negligence claim requires consideration of the facts (obviously), accuracy in presentation of the record is very important to the appropriate resolution of this controversy. Only by fictionalizing the record can Defendant, with any measure of coherence, urge the absence of legal duty:

1. Defendant argues that it is "undisputed that FIA did not receive a copy of the [1-26-98 cancellation] notice purportedly mailed by Wausau" (Defendant's application at p. 2; citing circuit court's Opinion/Order of 12/13/02, p. 3). In truth, the Circuit Court did not so find. Instead, and to the contrary, the Circuit Court stated that "FIA was shown as an intended addressee . . . and the notice was never returned as undeliverable." The Court of Appeals specifically stated that there was a presumption that the cancellation notice was received when it was sent in accordance with

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Wausau's established procedures. Slip op, p 5. In point of fact, defendant issued the at-issue false certificate after it had actual knowledge that the underlying policy had been canceled.

2. Defendant claims that "Primak knew the Wausau policy had already been canceled, but Primak never advised FIA of, or questioned FIA regarding the cancellation" (Defendant's application, p. 2). In fact, Primak testified in the opposite fashion, indicating that he called FIA about the cancellation well before Mr. Staten suffered his injury (TR., 2/22/02, 63, 81). Further, Wausau mailed the cancellation notice to Defendant.

3. Defendant appears to suggest (at p. 12 of its application) that Ms. Steingold had some knowledge of the Placement Facility rules, but in fact, Steingold conceded that she had never seen those rules until handed to her on cross-examination (TR., 4/8/02, 26-27, 32).

4. Defendant asserts (Application, p. 14) that there is some proof that the certificate was mailed to Wausau contemporaneously with its transmittal to Mr. Primak (citing, TR., 4/8/02, p. 212). Nothing on that page of the transcript, or anywhere else, for that matter, so indicates.

5. Finally, Defendant claims that Mr. Polec, Plaintiff's expert witness, supposedly admitted that Plaintiff's reliance on the certificate was unreasonable (Defendant's application for leave to appeal, p. 13). Mr. Polec conceded only that had the coverage been canceled after March 6, 1998, and given the impossibility (alleged) of notifying Distel, such reliance would have been unreasonable (see, TR., 4/8/02, 173, 176, 213). This is all irrelevant, however, because in fact, Wausau had canceled the policy much earlier, on February 20, 1998. The hypothetical question posed to Mr. Polec gathered an equally hypothetical, but irrelevant, answer.

Defendant's argument is meritless and misleading.

III. THE CIRCUIT COURT AND COURT OF APPEALS CORRECTLY REJECTED DEFENDANT'S "COMPARATIVE FAULT" ARGUMENT

A. Standard of Review

The applicability of the comparative fault statutes which Defendant cites is an issue of statutory construction, a question of law which this Court reviews de novo. *Hill v Sacka*, 256

Mich App 443, 447 (2003). Whether there was comparative negligence, on the other hand, is a purely factual matter, subject to review only for clear error. MCR 2.613(C).

B. Discussion

Defendant insists that the lower courts have ignored its argument that plaintiff's recovery must be offset by its "comparative fault." If the lower courts had found comparative fault, plaintiff would agree. However, defendant seems to be blind to the fact that the lower courts did not apply comparative fault principles because they agreed that plaintiff had no fault whatsoever.

The trial court found fault with defendant Farmington Insurance Agency. The court found no fault with Wausau Insurance or MMS. The trial court found no fault on plaintiff's behalf as well. How can defendant continue to insist that plaintiff's "comparative negligence" be applied when the finder of fact concluded that plaintiff's negligence was zero percent? Factually, defendant's issue lacks merit.

As argued at the Court of Appeals, there are additional legal reasons to reject defendant's argument. First of all, the tort reform enactments which Defendant cites only apply "[i]n an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death ..." MCLA 600.2957(1) and 6304(1). This is not such a case, because Plaintiff has never sought damages "for personal injury, property damage, or wrongful death," but rather, seeks the recovery of the amount of the worker's compensation redemption (of Mr. Staten's claim). Such a liquidated, economic harm is not a form of "damages for personal injury, property damage, or wrongful death," within the meaning of the enactments which Defendant cites. This is an action merely for the recovery of money, not for tangible, personal injury or property damage. Defendant's argument is contrary to the clear, unambiguous

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language of these statutes, which limits their effect to personal injury, death, and "property damage" cases. Id.; see, *Pohutski v Allen Park*, 465 Mich 675, 683 (2002).

Plaintiff is aware that the Court of Appeals has indicated the contrary in dicta. See *Holton v A. Insurance Associates*, 255 Mich App 318, 323-324 (2003). The holding in *Holton* was that there was no comparative fault to allocate, because the plaintiffs' claim was failure to procure requested insurance coverage, a sort of negligence which had nothing to do with the occurrence of the fire which would have been insured against. *Holton*, at 324-326. There was no causal connection between the alleged, comparative fault (giving rise to the fire itself), and the plaintiff's economic loss. Hence, it was unnecessary for the Court to consider whether the tort reforms apply to economic torts at all. "[S]tatements concerning a principle of law not essential to the determination of the case are obiter dictum and lack the force of an adjudication. *McNally v Wayne County Canvassers*, 316 Mich 551 [1947]." *Roberts v Auto-Owners Insurance Co.*, 422 Mich 594, 597-598 (1985). Moreover, the actual holding in *Holton* favors affirmance here, because it shows that the compensation award to Mr. Staten is no proof of comparative fault as a matter of law, but merely the risk to be insured against.

At any rate, the Circuit Court correctly held that Defendant's argument lacks merit for the simple reason that there was no one else at fault here. Mr. Primak testified that he relied on his agent, Defendant, to handle and advise on all insurance-related matters affecting his business, MMS. Primak testified that he informed Defendant of the cancellation notice soon after he received it. This was a relationship (agent/client) of longstanding duration. Defendant knew MMS's business inside out, and was aware that MMS's business required the issuance of certificates for the benefit of MMS and its customers. A copy of Wausau's Notice of Cancellation was sent to Defendant, and never returned to Wausau as undeliverable. Primak

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quite naturally assumed that the cancellation issue had been handled by Defendant, since Defendant had issued the certificate on March 6, 1998 -- subsequent to the issuance of the Notice of Cancellation. Primak had an absolute right to rely on the accuracy of the certificate, once issued. *Kaminskas*, 51 Mich App 40, 45. Defendant's own agent/employee, Ms. Steingold, so testified (TR., 4/8/02, 72-73). Primak's complaint to the Insurance Bureau (Exh. B dated: 6/1/98) reinforces Primak's innocence, as even on that later date, he believed that he had been "covered" for Staten's accident at Distel Tool. Defendant supported Primak's express position when it filed with the Insurance Bureau as well (Exh. E).

There was certainly no comparative negligence on Plaintiff's part, either. Defendant pounds away at the identity of this "certificate holder," (David Freedman, Inc.), but that hardly matters. Can anyone doubt that if Ms. Steingold had been asked to issue a certificate with Distel Tool as the certificate holder, she would have done so? That is hardly the point. It was mere happenstance that the certificate had David Freedman, Inc. as the listed certificate holder thereon. It was not the purpose of the certificate to limit the universe of persons who might rely thereon, but to, as its name indicates, certify that MMS had worker's compensation insurance for the dates indicated. The only "benefit" of being a certificate holder is that such entity might, but would not necessarily, receive a copy of any cancellation notice issued by the carrier after the certificate issued (see: Exh. D).

The main concern of Mr. Distel, and reasonably so, was that MMS have workers' compensation coverage in place. The certificate, no matter the named "holder" thereof, so certified. That certification, rendered by Defendant, was false. It was hardly unreasonable for Plaintiff (Distel) to believe what Defendant had affirmatively reduced to unambiguous writing.

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Defendant, the insurance agent, is supposed to be the expert. There was no comparative fault here, as a matter of law.

What is particularly galling about Defendant's presentation is that it would require Plaintiff "to verify that the coverage with Wausau was in effect," when Defendant had affirmatively undertaken the responsibility, as agent, of doing that itself, and violated the Placement Facility rules by issuing the certificate without specific authorization. There is no need for a remand for further findings on any comparative fault issues (see: Defendant's Brief at pp. 46-47). The Circuit Court appropriately rejected this argument, rendered specific findings on the question of Defendant's negligence, and signaled an appropriate rejection of Defendant's position by denying Defendant's Motion to Amend Findings, which raised the same argument (Motion: 2/12/03; Order: 3/6/03). There is no evidence that any party's fault played a causal role in Plaintiff's harm, other than that of Defendant-Appellant. *Holton*, 255 Mich App, 324-326. Comparative fault issues were raised at trial, were the subject of proposed findings of fact and conclusions of law postulated by all parties, and were actually decided in the Circuit Judge's written opinion. The Circuit Judge found defendant, and only defendant, culpable. Not only was that decision eminently correct, defendant has cited no record evidence to the contrary, let alone evidence that demonstrates clear error.

RELIEF

For the reasons stated in this brief, Plaintiff-Appellee respectfully asks this Honorable Court to deny defendant's application for leave to appeal, or to summarily affirm.

Respectfully submitted,

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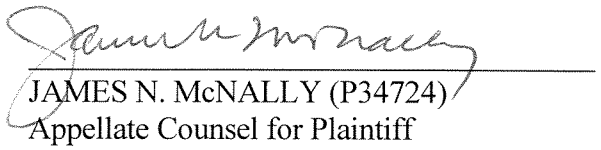
& SCHWARTZ, P.C.

By: 

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